No. 88-357 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORM MALENG, King County Prosecuting Attorney; AMOS E. REED, Secretary of the Washington Department of Social & Health Services; and KENNETH O. EIKENBERRY, Attorney General,

Petitioners,

—v.—

MARK EDWIN COOK,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to the preservation and defense of civil liberties. The ACLU of Washington is one of the ACLU's state affiliates.

This case presents an important question related to the availability of the writ of habeas corpus. The defense of the rights of the criminally accused and the vigorous pursuit of fairness in the criminal justice system have been major concerns of the ACLU since its inception. As a result, the ACLU has participated, either as counsel for one of the parties,

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1/ Pursuant to Rule 36.2 of this Court, amici have obtained the consent of the parties to this case prior to the filing of this brief, and their letters of consent are filed herewith.

or as amicus curiae, in numerous cases before this Court involving questions related to the fairness of the criminal justice system. The ACLU of Washington has participated both as amicus curiae and as counsel for a party in previous cases in the federal courts that presented issues affecting the rights of prisoners and the criminally accused. See e.g., Young v. State of Washington, No. 87-3990, slip op. (9th Cir. July 22, 1988); Hoptowit v. Spellman, 753 F.2d 779 (9th Cir. 1985).

INTRODUCTION AND STATEMENT OF THE CASE[2/]

The writ of habeas corpus is an important element of the American legal system. The writ's "'grand purpose . . . [is] the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.'" Peyton v. Rowe, 390 U.S. 54, 66 (1968) (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963)). Since "the basic purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom," Johnson v. Avery, 393 U.S. 483, 485 (1969), its availability impacts greatly upon the fair operation and administration of the criminal laws generally.

Cognizant of the necessity of the writ to ensure that governmental deprivations and restrictions of liberty occur only in appropriate circumstances and in accordance with the Constitution, Congress has authorized the federal courts to "entertain . . . application[s] for [the] writ of habeas corpus in behalf of . . .

2/ Amici adopt the Counterstatement of the Case set forth in Respondent's Brief, and briefly summarize the relevant facts herein.

person[s] in custody pursuant to the judgment of a State court." 28 U.S.C. §2254(a). The federal courts are authorized to consider habeas petitions where petitioners allege that they are "in custody in violation of the Constitution or laws or treaties of the United States." Id. Similarly, the federal courts' jurisdiction to grant writs of habeas corpus is statutorily limited to situations in which the petitioners are "in custody." See generally 28 U.S.C. §2241(c).3/

In the case now before the Court, Respondent Mark Cook filed a pro se

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3/ Section 2241 (c)(3) of Title 28 of the United States Code addresses the availability of habeas relief for state prisoners "in custody in violation of the Constitution or laws or treaties of the United States," and thus is the direct companion to 28 U.S.C. §2254. The remainder of 28 U.S.C. §2241(c) addresses the availability of the writ for persons "in custody" of other sovereigns, including the federal government. See 28 U.S.C. §§2241(c)(1) - (c)(2) and (c)(4) - (c)(5).

petition in the United States District Court requesting issuance of a writ of habeas corpus on the ground that he was subject to a lengthened term of imprisonment on account of a 1958 felony conviction which was allegedly obtained without an inquiry into his competence to stand trial, in violation of the United States Constitution.4/ The District Court dismissed the petition without reaching the merits, on the ground that Respondent Cook was not "in custody" within the meaning of the federal habeas statute, and thus held that it lacked subject matter jurisdiction.

4/ This Cou : has previously addressed the Constitutional deficiency of the imposition of criminal sanctions in the absence of an inquiry into the accused's competence to stand trial. See e.g., Pate v. Robinson, 383 U.S. 375 (1966). Respondent's petition was dismissed prior to any consideration of the merits of his underlying constitutional claim, but Respondent's Brief discusses the facts underlying the claim in greater detail.

The United States Court of Appeals for the Ninth Circuit reversed the dismissal of the petition by the District Court, and held that Respondent "is 'in custody' for the purposes of a habeas corpus attack on the 1958 conviction, and the district court erred in dismissing Cook's petition for want of subject matter jurisdiction." Cook v. Maleng, No. 86-4151, slip op. (9th Cir., June 2, 1988)(per curiam).[5/] The state of Washington filed its petition for writ of certiorari with this Court on August 27, 1988.[6/]

Amici American Civil Liberties Union and the ACLU of Washington join Respondent in urging this Court to affirm the decision

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5/ The decision below is reproduced in the Appendix to the Petition for Certiorari at A-1 - A-7.

6/ 57 U.S.L.W. 3336.

of the Ninth Circuit Court of Appeals, and to reject the narrow reading of 28 U.S.C. §2254 urged by the Petitioners in this case. The result urged by Petitioners herein would require a radical departure from the previous decisions of this Court, and amici urge the Court to reject the suggested departure from such well-established and sound legal principles.

SUMMARY OF ARGUMENT

Respondent Mark Cook seeks affirmance of the decision below which held that the district court's dismissal of his habeas petition for want of subject matter jurisdiction was erroneous as a matter of law. Amici present several arguments in support of Respondent's position.

First, the decisions of this Court clearly support the Court of Appeals'

finding that a habeas petition challenging the state's use of an allegedly unconstitutional prior conviction to determine a present or future sentence is cognizable in the federal courts. In addition, the decisions of the Courts of Appeals are consistent with the decision below, and these courts have developed useful systems for handling habeas petitions in which custody, in the form of an enhanced period of present or future incarceration, has been challenged on the ground that it is based, wholly or partially, upon an unlawful conviction.

The language of the habeas corpus statute itself supports a finding that Respondent is in custody for the purposes of federal jurisdiction over his petition. Analyzing the meaning of the habeas statute's "custody" requirement, this Court

held in Peyton v. Rowe, 391 U.S. 54 (1968) that the "custody" requirement of the federal habeas statute should be liberally construed:

> Nothing on the face of §2241 militates against an interpretation which views [the petitioners] as being "in custody" under the aggregate of consecutive sentences imposed on them. Under that interpretation, they are "in custody in violation of the Constitution" if any consecutive sentence they are scheduled to serve was imposed as the result of a deprivation of constitutional rights. This approach to the statute is consistent with the canon of construction that remedial statutes should be liberally construed.

391 U.S. at 364-65 (emphasis added).

This Court, in its rulings concerning collateral attacks; the use of unconstitutionally obtained past convictions that enhance present confinement; and competency; has already addressed each of the issues underlying this case. The Circuit Courts of Appeals

that have considered this issue directly have all held that the writ is available to challenge the enhancement of present custody by a prior conviction. This virtually unanimous body of federal case law either explicitly or implicitly acknowledges federal jurisdiction in cases like this The federal case law uniformly rejects the State's interpretation of the writ's "in custody" requirement.

The laws of the state of Washington mandate that prior convictions such as Respondent's are to be considered in sentencing for subsequent offenses. Thus, there is clearly a relationship between the prior conviction and present or future custody for Respondent and for similarly situated persons, and the constitutional validity of the prior conviction must be subject to challenge where, as here, it

could result in unlawful deprivation of liberty. In addition, state law provides that constitutional challenges to the validity of prior convictions may not be raised during sentencing, and must be addressed in post-conviction collateral attack proceedings. Thus, the availability of the federal habeas remedy is exceedingly important to Respondent.

Washington State makes the nexus between past conviction and present Sentencing Reform Act ("SRA") sentencing direct and mandatory. Washington provides that the effect of prior Class A felonies on present SRA sentencing never ends. Washington's sentencing scheme explicitly relies on collateral attacks to resolve the constitutional validity of the old conviction, and Washington's SRA elevates the importance of the constitutional

validity of the prior conviction. This Court must respect each one of Washington's choices. Each choice compels the conclusion that a petitioner challenging an old conviction meets the writ's "in custody" requirement and purposes.

Mark Cook's petition involves a fundamental right: the ability to understand the nature of the proceedings against him and to assist in his own defense. This right implicates his Sixth Amendment rights to effective assistance of counsel, to presence at the proceedings, and to confrontation. Denial of the right creates convictions so untrustworthy that factual guilt or innocence is implicated as well.

Finally, the brief of amici focuses on the implications of this court's decision for criminal defendants sentenced under the

Sentencing Reform Act ("SRA").1/ Every other state that has recently reformed its sentencing laws also relies upon prior criminal history in imposing sentences. D. Boerner, Sentencing in Washington (1985) §2.5(a) at 2-31. This brief therefore attempts to show what the consequences of this Court's decision will be on these States' legislative decisions to define the duration of the new sentence; these states' decisions about the nexus between old and new convictions; and these states' acknowledgement of a collateral forum for consideration of the validity of old convictions in current sentencing.

1/ The Sentencing Reform Act is codified at Wash. Rev. Code §§9.994A.010-9.994A.910.

ARGUMENT

I. THE COURT BELOW CORRECTLY CONCLUDED THAT THE FEDERAL COURTS HAVE JURISDICTION TO HEAR HABEAS PETITIONS CHALLENGING THE ENHANCEMENT OF PRESENT OR FUTURE CONFINEMENT AS A RESULT OF A PRIOR UNCONSTITUTIONAL CONVICTION

A. The Decisions Of This Court Clearly Establish That Habeas Petitions Alleging That A Prior Unconstitutional Conviction Has Been Or Will Be Used To Lengthen The Period Of Confinement Are Cognizable In Ihe Federal Courts

In Hensley v. Municipal Court, 411 U.S. 345 (1973) this Court observed that "[t]he custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberty." 411 U.S. at 351. Respondent's situation satisfies this requirement. Respondent faces the possibility of a lengthened prison sentence due to a prior conviction which he has alleged is constitutionally defective. The deprivation of liberty

through imprisonment must certainly be among the "severe restraints on individual liberty" referred to by this Court in Hensley. The prior decisions of this Court clearly establish that the deprivation of liberty which Respondent Cook is faced with satisfies the custody requirement of the federal habeas statute.

This Court has counselled that habeas relief is appropriate in "cases of special urgency," and that it should be reserved for cases where "the restraints on liberty are . . . severe." Id. at 351. In accordance with this principle, the Court has held that the custody requirement is satisfied in a variety of situations, most of them involving "less obvious

restraints"[8] than the deprivation of liberty threatened here.

In United States v. Tucker, 404 U.S. 443 (1972), this Court held that a prisoner could challenge, through a federal habeas petition, a sentencing court's use of a constitutionally invalid prior conviction to lengthen a current sentence.[9] In Tucker's case, the prior felony convictions were obtained without counsel or waiver of counsel, in violation of Gideon v. Wainwright, 372 U.S. 335 (1963). The Tucker court stated:

8/ Preiser v. Rodriguez, 411 U.S. 475, 486 n.7 (1973).

9/ This Court has also already held that a prisoner serving consecutive sentences may file a writ of habeas corpus to challenge the later sentence. Peyton v. Rowe, 391 U.S. 54. The prisoner need not wait until the later sentence starts to challenge its constitutionality. Thus, the fact that Cook challenges enhancement that has not yet commenced does not detract from his claim.

> [T]he real question here is not whether the results of the Florida and Louisiana proceedings might have been different if the respondent had counsel, but whether the sentence in the [subsequent] 1953 federal case might have been different if the sentencing judge had known that at least two of the respondent's previous convictions had been unconstitutionally obtained . . . . [T]he answer to this question must be "yes" for if the trial judge in 1953 had been aware of the constitutional infirmity of two of the previous convictions, the factual circumstances of the respondent's background would have appeared in a dramatically different light at the sentencing proceeding.

404 U.S. at 448 (footnotes omitted) (emphasis added). The Tucker Court held that the writ is available to challenge the use of prior, already served, but unconstitutionally obtained, convictions which are used to enhance a current sentence.

In addition, the Tucker Court held that the standard for determining whether those old convictions enhanced a current

sentence is whether the sentence in the subsequent case "might have been different if the sentencing judge had known" that the prior convictions were unconstitutionally obtained. 404 U.S. at 448 (emphasis added).10/

10/ Significantly, Respondent in the case before the Court will certainly be subjected to different sentencing standards and presumptions on the basis of his 1958 conviction.

In one respect, Cook's position has been less fully developed than Tucker's. Tucker already had the benefit of a state court decision invalidating, on constitutional grounds, two of his three prior felony convictions, and a government concession of the same point. See 431 F.2d at 1293. The validity of Tucker's third conviction "had not been determined," 404 U.S. at 448 n.6. Nevertheless, this Court remanded for resentencing without consideration of any prior, unconstitutionally obtained convictions. 404 U.S. at 449 (affirming Court of Appeals' decision to remand "without consideration of any prior convictions which are invalid . . . .," 431 F.2d at 1294). Such remand follows logically from this Court's previous holding that an unconstitutionally obtained conviction cannot be used "either to support guilt or enhance punishment for another offense . . . ." Burgett v. Texas, 389 U.S. 109, 115 (1967)(emphasis added).

While the issue of what forms of restraint upon liberty are sufficient to satisfy the custody requirement of the federal habeas statute is a question of federal law, the state law provisions setting forth the terms of confinement or other punitive or restrictive features of conviction guide the federal courts in their resolution of the question. For example, in Hensley v. Municipal Court, 411 U.S. 345, this Court held that a petitioner is "in custody," when released on his own recognizance pending the outcome of post-conviction remedies. The Court reached this conclusion by scrutinizing the restraints upon individual liberty that accompanied recognizance release in California. In California, those restraints included rearrest for failures to make required court appearances. See

also Aaron v. Pepperas, 790 F.2d 1360 (9th Cir. 1986); Owens v. Cardwell, 628 F.2d 546 (9th Cir. 1986).

Every other court that has considered this issue has also looked to the confining state's law. See e.g., Lyons v. Brierley, 435 F.2d 1214 (3d Cir. 1970)(denial of writ vacated and remanded; court looks to Pennsylvania law to determine whether successful challenge to prior, fully served state sentence would shorten confinement on current charge); United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224 (3d Cir. 1970)(reversing dismissal of writ; court looks to New Jersey law); Cappetta v. Wainwright, 406 F.2d 1238 (5th Cir.), cert. denied, 396 U.S. 846 (1969)(denial of writ reversed and remanded; court looks to Florida law to decide if petitioner's later, unrelated sentence would be affected

by successful challenge to prior); United States ex rel. Durocher v. LaVallee, 330 F.2d 303 (2d Cir.), cert. denied, 377 U.S. 998 (1965)(denial of writ reversed and remanded; court looks to New York law to determine whether it was "possible" that resentencing without reliance upon prior, challenged conviction would shorten the sentence); Glover v. North Carolina, 301 F.Supp. 364, 367 (E.D.N.C. 1969)(writ available to challenge "disabilities and restraints on his liberty as a result of his having been convicted on seven felonies," even after unconditional discharge; court looks to North Carolina law to see what disabilities burdened petitioner).

This Court has thus held that federal courts have jurisdiction to entertain petitions where the sole restraint on

liberty is parole. Jones v. Cunningham, 371 U.S. 236 (1963). This Court has held that even personal recognizance release pending post-conviction relief is a sufficient restraint to make the writ an available remedy. Hensley, 411 U.S. 345. This Court has further held that restraints on petitioner's ability to engage in a business, to hold union office, to vote in state elections, or to serve as a juror are also deprivations sufficient to warrant habeas relief. Carafas v. Lavalee, 391 U.S. 234 (1968).11/

11/ Cf. Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968)(naval reservist who was denied a discharge is "in custody" for purposes of writ); Glover, 301 F.Supp. 364 (writ available where petitioner deprived of rights to hold office, serve as juror, and practice business or profession).

B. The Circuit Courts That Have Addressed This Issue Have Developed A Procedure For Reviewing The Validity Of The Prior Conviction

Several circuit courts of appeal have considered whether the writ is available to challenge the increased length of a current sentence when it is caused directly by a prior, already served, conviction and sentence. Every one of these courts has held that the writ is available. See e.g., Lyons v. Brierley, 435 F.2d 1214; United States ex rel. DiRienzo v. New Jersey, 423 F.2d 224; Cappetta v. Wainwright, 406 F.2d 1238; Harrison v. Indiana, 597 F.2d 115 (7th Cir. 1979); Williams v. Peyton, 372 F.2d 216 (4th Cir. 1967); Tucker v. Peyton, 357 F.2d 115 (4th Cir. 1966); Martin v. Virginia, 349 F.2d 781 (4th Cir. 1965);

United States ex rel. Durocher v. LaVallee, 330 F.2d 303.[12/]

In the Ninth Circuit, the courts have explicitly developed procedures for streamlining this decision. In Campbell v. Kincheloe, 829 F.2d 1453 (9th Cir. 1987), Campbell was convicted of aggravated murder in the first degree in Washington, and sentenced to death. Campbell's prior burglary conviction was admitted for consideration by the jury in its sentencing deliberations. Campbell challenged the constitutional validity of the prior burglary conviction. The court

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12/ The cases upon which the state relies are inapplicable. Cotton v. Mabry, 674 F.2d 701 (8th Cir.), cert. denied, 459 U.S. 1015, 103 S.Ct. 374, 74 L.Ed.2d 508 (1982), is based on a factual determination of no direct enhancement. Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984) and Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982), are venue cases. They both explicitly refer the petitioner to the correct federal forum when two separate states' custody was involved.

addressed the merits of Campbell's claim (just as the district court should do in this case), holding:

> "It is . . . well-established that a sentence is subject to review if it has been enhanced in reliance on an unconstitutional conviction." United States v. Williams, 782 F.2d 1462, 1466 (9th Cir. 1986)(citing United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972)). To prevail on his claim Campbell must show that (1) the prior conviction was unconstitutional and (2) his sentence was enhanced in reliance on the prior conviction.

Campbell, 829 F.2d at 1461.

To streamline the procedure, the Campbell court first determined that there was no direct relationship between the prior burglary and the sentence of death. It therefore never reached the constitutional claim. See generally Farrow v. United States, 580 F.2d 1339, 1355 (9th Cir. 1978)(en banc)(proposing this streamlined approach). See also

Tisnado v. United States, 547 F.2d 452, 456 (9th Cir. 1976).

This procedure separates potentially meritorious petitions. This Court need not restrict jurisdiction over potentially meritorious claims such as Cook's when less restrictive procedures for disposing of nonmeritorious claims are available.[13/]

II. THE INTERESTS OF FEDERALISM WILL BE SERVED BY AFFIRMANCE OF THE DECISION BELOW BECAUSE STATE LAW GIVES EFFECT TO PRIOR CONVICTIONS SUCH AS RESPONDENT'S AND REMITS CONSTITUTIONAL CHALLENGES TO THEIR VALIDITY TO POST-CONVICTION RATHER THAN SENTENCING FORUMS

A. Washington Law Provides For Direct, Mandatory, Sentence Enhancement Due To Prior

13/ Similarly, Petitioners' concerns that affirmance of the decision below will lead to the assertion of stale claims are more appropriately addressed by other means. For example, Rule 9 of the Rules Governing Section 2254 Cases in the United States District Courts specifically provide that a habeas petition may be dismissed on the grounds of delay in certain circumstances.

Convictions, So The Nexus Between Prior Conviction and Current Confinement Is Undeniable

Common sense dictates that persons, who are incarcerated at the time of the filing of their habeas petitions and face certain future confinement are "in custody." The only logical way to explain the controversy over whether the "in custody" prerequisite is met is that the courts actually look at whether a sufficient nexus exists between the current custody and the prior, challenged conviction. A Fifth Circuit case explained this approach:

> [J]urisdiction exists if there is a positive, demonstrable relationship between the prior conviction and the petitioner's present incarceration.
>
> We agree with the appellee that the "positive relation" between prior conviction and present confinement envisioned in Cappetta is missing here. Although the Board of Pardons sent appellant a form letter

> citing his past criminal record as one reason for denying him clemency, the Board also cited appellant's original offense, his poor prison conduct, and opposition from law enforcement personnel as reasons for the denial. We believe that, under the circumstances, the relationship between the 1963 sentence and appellant's present confinement is "speculative and remote."

Sinclair v. Blackburn, 599 F.2d 673, 676 (5th Cir. 1979), cert. denied, 444 U.S. 1023 (1980)(emphasis added).

The decisions upon which the State relies, and which reject jurisdiction, either acknowledged that jurisdiction would lie in the appropriate forum (Ward v. Knoblock, 738 F.2d 134 (6th Cir. 1984), cert. denied, 469 U.S. 1193 (1985) and Harris v. Ingram, 683 F.2d 97 (4th Cir. 1982)) or else found an insufficient nexus between the prior conviction and current custody (Cotton v. Mabry, 674 F.2d 701 (8th

Cir.), cert. denied, 459 U.S. 1015 (1982)). In all, whether the court had jurisdiction depended on a factual finding: whether, under the applicable state law, the prior conviction was the "but for" cause of future sentence enhancement.14/

In the Ninth Circuit, the nexus test is whether there is a "reasonable probability" that the sentence in the later case would have been different without the challenged prior conviction. Campbell v. Kincheloe, 829 F.2d 1453, 1461; Owens v. Cardwell, 628 F.2d 546, 547; Farrow v. United States, 580 F.2d 1339, 1355. See also United States v. Williams, 782 F.2d 1462, 1467.

14/ Professor Larry Yackle explains the finding this way: "'Custody' functions, on a nonconstitutional level, similarly to the 'injury in fact' requirement for adjudication in an article III court." Yackle, Explaining Habeas Corpus, 60 N.Y.U.L.Rev. 991, 1004 (1985).

In the Second Circuit, a court defined the necessary relationship between prior conviction and unrelated, subsequent, enhanced confinement as the "possibility" of lower sentencing absent the challenged prior. LaVallee, 330 F.2d at 305 n.2 ("While the sentences which Durocher received as a second offender did not exceed the maximum possible sentences for a first offender, this should in no way affect our result . . . . It is possible . . . that upon resentencing, Durocher would receive a sentence shorter than the period he has already served. This possibility is sufficient to warrant the issuance of a federal writ of habeas corpus.")(emphasis added). In the Third Circuit, the court pointed to a nexus between old and new that "directly and indubitably affects the duration of petitioner's confinement under

the second sentence." Lyons v. Brierley, 435 F.2d 1214, 1216 (emphasis added).

Cook's lengthened confinement meets any of these standards. Under Washington's new sentencing scheme, the Sentencing Reform Act ("SRA"), this conclusion is even more compelling. A criminal's prior, class A felony conviction will always directly and mandatorily affect the length of his confinement for subsequent criminal convictions. Thus, there is much more than a "possibility" that a current sentence would be lowered if the prior conviction were vacated -- under Washington state law it is, in many instances, a certainty.

As discussed fully in Respondent's Brief, Mr. Cook's sentence will be affected by the SRA even though his conviction predates the enactment of the

statute. Washington law provides that in cases such as Mr. Cook's, the enhancement effect of the prior conviction will be determined by the Indeterminate Sentencing Review Board. In re Bush, 95 Wn.2d 551, 627 P.2d 953 (1981). However, even though his sentence will be determined by the Indeterminate Sentencing Review Board, the Board is bound by state law to use the SRA standard sentencing provisions as the presumptive sentence. See Addleman v. Board of Prison Terms and Paroles, 107 Wn.2d 503, 730 P.2d 1327 (1986). Thus, the State's claim that the prior conviction's enhancement effect for Mr. Cook is collateral and attenuated is misleading. Moreover, for persons whose sentences will be governed directly and exclusively by the SRA, the state's suggestion of a tenuous relationship between prior conviction and

present or future sentence is clearly inapplicable.

The SRA sentencing court is bound to rely upon prior criminal history, including challenged prior convictions. Wash. Rev. Code §9.94A.120(1) provides that, "[e]xcept as authorized in subsections (2), (5) and (7) of this section, the court shall impose a sentence within the sentence range for the offense." (Emphasis added).[15/]

15/ None of the three exceptions to this rule allows a judge to exclude a prior, challenged conviction from the calculation of criminal history simply because of the challenge. Subsection (5) allows departure from the standard range for first-time offenders. This subsection will never provide a statutory basis for a previously convicted felon to ask the sentencing court to ignore a challenged prior conviction. Subsection (7) allows departure from the standard range for certain first-time sex offenders in favor of treatment. Under subsection (2), "the court may impose a sentence outside the standard sentence range for that offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional

(continued...)

There is no statutory provision for escaping the enhancement of a current sentence by a prior, challenged conviction. There is no statutory provision for disregarding a prior conviction when computing the standard range. No Washington case has ever held that a prior, challenged conviction is a "mitigating factor" justifying a departure from the standard sentence range.

In fact, state law holds just the opposite: the court cannot choose to disregard a prior conviction, even for reasons of constitutional magnitude. State v. Falling, 50 Wn.App. 47, 53, 747

15/ (...continued)
sentence." Wash. Rev. Code §9.94A.120(2). The statutory list of illustrative, mitigating factors that meet this "substantial and compelling" test deal with the nature of the crime and the criminal's actions or state of mind. None address the validity of prior convictions.

P.2d 1119 (1987) held that "the reasons for imposing an exceptional sentence must encompass factors other than those that are inherent to the offense and are used in computing the presumptive range for the charge." (citing State v. Nordby, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). Criminal history is used in computing the presumptive range for the charge. Thus, under Washington's SRA, a judge cannot disregard criminal history even if it includes a challenged conviction. In fact, under the SRA, a prosecutor cannot choose to refrain from alleging a prior criminal conviction at sentencing -- even if that conviction's constitutional validity is challenged. Wash. Rev. Code §9.94A.080(6)(plea agreements may include "any . . . promise to the defendant, except

that in no instance may the prosecutor agree not to allege prior convictions.")

In addition, a prior, Class A, felony conviction never expires under state law. Cook's challenged 1958 conviction was for three robberies.[16] See Wash. Rev. Code §9A.56.200. "[C]lass A felony convictions shall always be included in the offender score." Wash. Rev. Code §9.94A.360(2)(emphasis added). Their effect never "expires."[17]

16/ These were not ranked A, B, or C in 1958.

17/ If they are now considered Class B felonies, their effect does not expire in Cook's case either, because he never spent the requisite number of crime-free years out of prison. See Wash. Rev. Code §9.94A.360(2). Accord State of Washington Sentencing Guidelines Commission, Sentencing Guidelines Implementation Manual (June 1984) at I-7 (describing Wash. Rev. Code §9.94A.360(12)'s provisions that Class B and C felonies only "wash out" over time) and II-33 ("The commission decided that adult Class A felonies should always be considered as part of the offender score.")

A leading commentator on the effect of old convictions on SRA sentencing adopted another phrase to express the non-expiration of Class A felonies: the "decay policy." D. Boerner, Sentencing in Washington §5.6(d) at 5-10, 5-11. Class A felonies never decay. Nor can Class A felonies ever be vacated.[18]

Thus, the State errs in asserting that the old conviction has "expired." An old class A felony conviction never expires or decays, it can never be vacated and under state law it "shall" always be used in future sentencing.

The SRA relies on past criminal convictions, rather than past criminal conduct or prior arrests, to determine the defendant's offender score. Prior to the

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18/ See Wash. Rev. Code §9.94A.030(18) and Wash. Rev. Code §9.94A.230.

SRA, the sentencing court could rely on prior arrests, allegations of criminal conduct, or other information short of conviction. See In re Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988); State v. Blight, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977); State v. Russell, 31 Wn. App. 646, 648, 644 P.2d 704 (1982). While non-conviction information may still be considered at sentencing for some purposes, see D. Boerner, §§6.12 - 6.13, it is not the basis for the presumptive sentence.

Washington has consciously elevated the importance of actual past convictions. Now the State need not introduce any information concerning the prior conviction at sentencing -- the fact of conviction alone suffices. Since the fact of conviction is the only part of the criminal history upon which the judge may rely, the

constitutional propriety of the prior conviction becomes much more important. If the defendant's prior conviction were constitutionally invalid, use of the fact of that conviction at subsequent sentencing would result in great injustice. As this court stated in the context of sentence enhancement to the death penalty due to the fact of a prior, constitutionally invalid conviction in Johnson v. Mississippi, 486 U.S. ___, 108 S.Ct. 1981, 1986 (1988):

> The fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct -- the document submitted to the jury proved only the facts of conviction and nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of

punishment pursuant to an invalid conviction as an aggravating circumstance.

(Emphasis added).

B. Washington Explicitly Requires Collateral Attacks To Determine The Constitutional Validity Of Prior Convictions Used For Enhancement

The Washington Supreme Court has instructed habeas litigants that they cannot raise constitutional challenges to the validity of prior sentences in SRA sentencing proceedings, and directs them to attack the constitutional validity of any prior conviction in post-conviction collateral proceedings. The Washington Supreme Court held in State v. Ammons that

> [t]he defendant has no right to contest a prior conviction at a subsequent sentencing . . . . The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

State v. Ammons, 105 Wn.2d 175, 188, 713 P.2d 719, 718 P.2d 796, cert. denied, ___ U.S. ___, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986). Thus, Cook, by filing this writ, took the only path that the Washington Supreme Court left open to him.19/

Thus, Washington law not only makes the consequences of a prior felony upon current sentencing direct and mandatory; it also directs the defendant to the collateral forum. It is manifestly unfair for the State to assert in this case that the State's own provisions for determining

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19/ The Washington Supreme Court reiterated the rule that collateral attack is the only forum available to those in Cook's position in State v. Jones, 110 Wn.2d 74, 79, 750 P.2d 620 (1988)(en banc). See also In re Williams, 111 Wn.2d 353, 367-68, 759 P.2d 436.

claims such as Cook's interferes with the State's sentencing scheme.

The SRA makes the effect of prior convictions mandatory. It specifically makes new sentences depend upon old crimes. Neither proportionality, accountability, nor any other legitimate State goal, however, is served by reliance upon "misinformation of constitutional magnitude,"[20] or "materially untrue" information in sentencing.[21] Washington itself acknowledges this principle.

As this Court observed in Burgett v. Texas, 389 U.S. 109 (1967), "[t]he States are free to provide such procedures as they

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20/ United States v. Tucker, 404 U.S. at 447 (referring to later use of prior conviction obtained absent counsel or waiver).

21/ Townsend v. Burke, 334 U.S. 736, 741 (1948)(describing record of prior, uncounseled conviction). Accord In re Bush, 26 Wn.App. 486, 497, 616 P.2d 666 (1980), aff'd, 95 Wn.2d 551, 627 P.2d 99 (1981).

choose . . . provided that none of them infringes a guarantee in the Federal Constitution." 389 U.S. at 113-14. If Respondent is deprived of the opportunity for federal habeas review, the Court would effectively allow Washington, and other jurisdictions a freedom heretofore unrecognized: the freedom to structure a criminal justice system immune, in an important respect, from constitutional challenge and irreverent of the legitimate concerns served by federal habeas review of state criminal convictions.

III. WHETHER COOK'S PETITION IS DEEMED A CHALLENGE TO A PAST CONVICTION OR A CHALLENGE TO FUTURE CONFINEMENT, THE RESULT IS THE SAME

It is undisputed that the writ is available to challenge future confinement. Peyton v. Rowe, 391 U.S. 54, 20 L.Ed.2d 426, 88 S.Ct. 1549 (1968). See generally,

Annot. 36 L.Ed.2d 1012, 1021-22 (1974). The writ is also available to challenge the legal restraints of past convictions. E.g., Jones v. Cunningham, 371 U.S. 236.[22/]

No matter how the court chooses to categorize the challenge, the result should be the same:

22/ As one commentator recently explained:

> It occasionally happens that a previous conviction, the sentence for which has been served, nonetheless continues to influence a litigant's current status . . . . In circumstances of that kind, the validity of the prior conviction can be challenged in a habeas attack upon the new conviction or sentence -- based on the theory that use of an invalid prior judgment constitutes new and independent federal error. The result, of course, is a belated attack on the prior conviction itself. In some instances, courts have permitted petitioners to challenge previous convictions straight forwardly in these circumstances, apparently on the theory that their effect upon applicants' current detention constitutes "custody" for habeas purposes.

Yackle, Explaining Habeas Corpus, 60 N.Y.U.L.Rev. at 1009-10 n.31 (emphasis added).

> [I]t is now plain that [prisoners] are sufficiently in the "custody" of consecutive sentences to invoke the writ to attack future terms not yet begun. Looking the other way, prisoners who complain that the sentences they are now serving were enhanced by prior convictions may attack those earlier judgments in the course of a challenge to their present terms.

Yackle, Postconviction Remedies, §43 at 186 (1981).[23/]

In Cook's case there is no venue problem; if anything, there is a labelling problem (i.e., Respondent's petition may have been, at worst, mislabelled as an

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23/ Characterizing this as a "past" or "future" challenge would be important only if the 1958 and 1976 convictions occurred in different states; then, questions about the correct forum in which to file or to exhaust might arise. See e.g., St. John v. Sargent, 569 F.Supp. 696 (N.D.Cal. 1983)(§2254 challenge to California conviction used to enhance Arkansas sentence; court holds custody requirement would be met in Arkansas, not California). See generally Yackle, id. §68 at 286-96. Cook's convictions both occurred in the State of Washington, so no problem with different forums is presented here.

attack on the old charge instead of an attack on the present custody imposed by the State's detainer). This Court should not punish Mr. Cook, as the State seeks to do, if it determines that he failed to label his petition with the correct words. Haines v. Kerner, 404 U.S. 519 (1972). Cook filed his petition pro se, and the rule of liberal construction applies. This is particularly true for habeas actions, where this Court has "consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. at 350; accord Peyton v. Rowe, 390 U.S. at 66 ("'[the writ] is not now and never has been a static, narrow, formalistic

remedy.'")(citation omitted). Finally, as this Court stated, in granting relief to a prisoner who challenged the enhancement of his New York State sentence because of his prior, 1939, federal conviction, obtained without counsel or waiver: "In behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." United States v. Morgan, 346 U.S. 502, 505 (1953).

The substantive issue is essentially settled; only the procedural one (the proper forum in which to file) or the formal one (whether to call it a retrospective or a prospective attack) remain in question at all, and neither issue needs to be resolved to decide Cook's case.

IV. THE UNDERLYING CONSTITUTIONAL CLAIM IN RESPONDENT'S CASE IS WELL-ESTABLISHED, AND HE IS CERTAINLY ENTITLED TO CHALLENGE THE VALIDITY OF HIS PRIOR CONVICTION IN A FEDERAL FORUM ON THIS GROUND

This case raises fundamental constitutional issues. Cook's claim encompasses both the procedural due process issue that he identified in his habeas petition and Sixth Amendment issues. The test of competency to stand trial under federal law is "whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding of the proceedings against him." Annot. 4 L.Ed.2d 2077, 2083 (1964)(emphasis added). The test is the same under Washington law. "'Incompetency' means a person lacks the capacity to understand the nature of the proceedings against him or to assist in his own defense as a result of mental disease or defect."

Wash. Rev. Code §10.77.010(6)(emphasis added).

It is undisputed that competency is a basic underpinning of a defendant's fundamental due process right to a fair trial. Drope v. Missouri, 420 U.S. 162, 172 (1975). Competency also implicates the rights to be mentally present, to confront one's accusers, and to consult with counsel and thereby assist in one's own defense both prior to and during trial. State v. Maryott, 6 Wn.App. 96, 492 P.2d 239 (1971).[24/]

The Sixth Amendment aspect of this claim brings it under the rubric of the core, Burgett-Tucker line of cases precluding the use of convictions obtained

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24/ See also State v. Murphy, 56 Wn.2d 761, 355 P.2d 323 (1960)(right to mental presence denied by giving defendant tranquilizers).

in violation of this fundamental right for any purpose. Therefore, the underlying constitutional claim in Cook's case is well-established in federal constitutional law.

Further, because competency involves defendant's full use of mental faculties, these claims are difficult for a petitioner to enunciate while still lacking full use of those faculties. The age of these claims does not, therefore, typically bar them. This is true even though competency claims typically raise questions that are difficult to answer even a few years later.25/

25/ See Dusky v. United States, 362 U.S. 402 (1966)(recognizing "the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioners competency as of more than a year ago, but reviewing the claim anyway). Accord Pate v. Robinson, 383 U.S. at 387 ("[W]e have previously (continued...)

Cook's claim is thus a fundamental one. It is one that implicates procedural due process and Sixth Amendment rights. Because it implicates the right to assist counsel in providing effective representation, it is a claim which, if proven, would invalidate any enhanced sentencing based upon the prior conviction because that sentencing would rest upon "misinformation of constitutional magnitude," as in Tucker. Cook's claim thus raises no novel problems for the Court. It rests squarely upon well-established rights and involves long-accepted principles.

25/ (...continued)
emphasized the difficulty of retrospectively determining an accused's competence to stand trial.")

CONCLUSION

For the reasons set forth herein, amici urge this Court to affirm the decision below.

Respectfully submitted,

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